No. 88-135

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In The Supreme Court of the United States
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF OF RESPONDENTS, MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, AND COUNTRY CAPITAL MANAGEMENT COMPANY, IN OPPOSITION

BERNARD HARROLD
Counsel of Record
WILDMAN, HARROLD,
ALLEN & DIXON
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400
Counsel for Respondents

American Reprographics Management, Inc.™ (312) 332-ARMI (800-999-6239)

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LIST OF PARTIES

Charles Larrance, Petitioner

The Illinois Human Rights Commission, Respondent

The Illinois Department of Human Rights, Respondent

Macon County Farm Bureau*, Respondent

Country Casualty Insurance Company*, Respondent

Country Insurance Company* (currently known as Country Preferred Insurance Company), Respondent

Country Mutual Insurance Company*, Respondent

Country Life Insurance Company*, Respondent

Country Capital Management Company*, Respondent

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* Parent Corporation: Illinois Agricultural Association ("IAA"). Affiliate companies of IAA include: Illinois Agricultural Service Company; Illinois Agricultural Auditing Association; AgriVisor Services, Inc.; IAA Trust Company; Illinois Milk Producers Association; GROWMARK, Inc.; Interstate Producers Livestock Association; Illinois Agricultural Holding Co.; IAA Federal Credit Union; Prairie Farms Dairy, Inc.; IAA Recreation Association; FS Credit Corporation; Illinois Livestock Marketing Company; P.F.D. Supply Corporation; Ice Cream Specialties, Inc.; Muller-Pinehurst Dairy, Inc.; Mid-Co Commodities, Inc.; Country Capital Growth Fund, Inc.; Mo-Kan Express, Inc.; Hiland Dairy Company; Roberts Dairy Company; FS Farmco, Inc.; Country Capital Tax Exempt Bond Fund, Inc.; Country Capital Income Fund, Inc.; Best Ever Companies, Inc.; Ideal-American Dairy; Grantland FS, Inc.; Country Investors Life Assurance Company; Chapman Ice Cream Co.; East Side Jersey Dairy, Inc.; Illinois Grain Corporation; Northwest Farm Bureau Insurance Company; Country Capital Money Market Fund, Inc.; Farmers Export Co.; Agri-Trans Corporation; Pinnacle Insurance Company; Illinois Cooperative Futures Company; FS Consolidated Feeds, Inc.; and CC Services, Inc.

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Respondents, Macon County Farm Bureau, Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company, respectfully request that this Court deny the petition for writ of certiorari.

JURISDICTION

The order sought to be reviewed was issued on October 6, 1988 by the Illinois Supreme Court.

The statutory provision Petitioner believes confers jurisdiction on this Court to review the order is 28 U.S.C.A. § 1257(3) (West 1966).

This Court lacks jurisdiction over the Petition. The order of the Illinois Supreme Court denying leave to appeal is not a reviewable judgment under 28 U.S.C.A. § 1257(3) (West 1966).

This Court lacks jurisdiction over the questions presented in that neither raises a federal question.

STATEMENT OF THE CASE

Petitioner, Charles Larrance, was Macon County Agency Manager for Respondents (hereinafter referred to as "Country Companies"). He had contractual agreements with Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company. Larrance was notified by letter of April 27, 1979, received on April 30, 1979, that his contracts would be terminated effective May 31, 1979. His last day of work was May 31, 1979. (May 21, 1985 Report of Proceedings before the Illinois Human Rights Commission, Vol. VII, hereinafter referred to as "R. Vol. VII" at 3, 4, 28.)[1]

On July 9, 1979, Larrance went to the Commission's office in Springfield, Illinois. (May 21, 1985 Report of Proceedings before the Commission, Vol. VIII, hereinafter referred to as "R. Vol. VIII" at 14; R. Vol. VII at 4.) He filled out a form entitled "Complainant Information Sheet," asserting discrimination on

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[1] At the time Larrance filed his charge, the Illinois Human Rights Commission was known as the Illinois Fair Employment Practices Commission. The Illinois Human Rights Act was known as the Illinois Fair Employment Practices Act. For convenience, Country Companies will refer to both agencies as "the Commission" and both statutes as "the Act."

the basis of physical handicap and identifying "Country Companies, Box 2000, Bloomington, Illinois 61701" as his employer. (Resp. Ex. 1; R. Vol. VII at 116.) After filling out the form, Larrance was interviewed by George Crawford, a Commission intake representative. (R. Vol. VIII at 14, 15.) Crawford took notes during the interview. (Pet. Ex. 3; R. Vol. VII at 111; R. Vol. VIII at 21.) The purpose of the interview was to elicit information from Larrance about the alleged discrimination. (R. Vol. VIII at 15.) The Commission did not in 1979, or at any other time, conduct an investigation before a charge was filed. (R. Vol. VIII at 80, 107.)

As of July 9, 1979, the Commission was operating under a Rapid Charge Processing System designed to facilitate the swift acceptance and handling of charges. (Resp. Ex. 17; R. Vol. VII at 126.) Crawford told Larrance that he had 180 days, or until "some time towards the end of November," to file his charge. (R. Vol. VIII at 45.) It was Crawford's practice to tell people to file their charges "as soon as possible." (*Id.* at 78.) Larrance, however, never determined the last day on which his charge could be timely filed. He paid "no particular concern" to it. (R. Vol. VII at 70-72.)

Larrance gave Crawford information about his case. He provided Crawford with the identities of the parties with whom he had agency manager contracts. (R. Vol. VIII at 73-74.) Larrance also complained to Crawford on July 9 about the renewal commissions he was being paid by Country Companies. (*Id.* at 72.)

There is no evidence that Larrance asked the Commission to file a charge on July 9. (R. Vol. VII at 6-7, 9-10.) Had Larrance requested that the Commission type and file a charge on that date, the agency would have done so. (R. Vol. VIII at 131-132, 161; Resp. Ex. 5; R. Vol. VII at 119; Resp. Ex. 3; R. Vol. VII at 118.) Sandra Kimberly, Larrance's expert witness from the Commission, was unaware of anyone who had ever been turned away after insisting on filing a charge. (R. Vol. VIII at 161.) Larrance's claim that the Commission "refused" to accept his charge has no support in the record.

Crawford determined at the July 9 interview that "there were a couple of items . . . needed to be pursued." (*Id.* at 27.) He wrote in his notes of July 9 that he wanted to see Larrance's agency manager contracts. (Pet. Ex. 3; R. Vol. VII at 111; R. Vol. VIII at 21.) Crawford "generally left it to the complaining party . . . to contact [him] with the information." (R. Vol. VIII at 28.) It was Crawford's practice to get as much information as possible at the initial interview to "save a lot of unnecessary paperwork." (*Id.* at 105.) A Commission form Larrance was given no later than July 9 states that complainants should bring "any papers or documents that relate to [their] charge" to the initial interview. (Resp. Ex. 18; R. Vol. VII at 127.) Crawford asked Larrance on July 9 to provide him with copies of the agency manager contracts. (R. Vol. VIII at 191.)

Larrance did not return to the Commission or produce the agency manager contracts until October 29, more than 180 days from the date on which he learned of his termination. (R. Vol. VII at 11, 66.)

On October 3, 1979, Larrance retained Jon Robinson as his general attorney and consulted with him regarding his claim of discrimination. (*Id.* at 22, 54; Larrance's Answers to Interrogatories 1 and 2.) The "bulk" of the discussion on that date concerned renewal commissions. (*Id.* at 96.) Even before meeting with Robinson, Larrance had discussed the subject of renewal commissions with Mr. Schleuter and Mr. Cassens of Country Companies. (*Id.* at 80-81.)

On October 3, 1979, Larrance and Robinson still had over three weeks to file a charge within 180 days of notice of Larrance's termination. On October 4, 1979, Robinson wrote a letter to Duane Miller, Executive Vice President of Country Companies. (Resp. Ex. 2; R. Vol. VII at 117.) This letter, which Larrance knew Robinson was writing, "zeroed in on the renewal activity." (R. Vol. VII at 79, 85.) The letter stated as follows:

> [T]he Illinois Fair Employment Practices Commission has been contacted regarding the basis for his termination, and we would like to pursue this if your Company is not willing to pay him the three percent (3%) commission on renewals.

(Resp. Ex. 2.) The content of the letter was what Larrance wanted Robinson to say. (R. Vol. VII at 79, 85.) Larrance testified that had the renewal dispute been resolved in his favor, he would not have filed a charge of discrimination. (*Id.* at 77.)

Larrance did not file his charge until November 15, 1979, 199 days after Country Companies notified him of his termination. (Pet. Ex. 7; R. Vol. VII at 113.)

REASONS FOR DENYING THE WRIT

A. The Order Of Which Petitioner Seeks Review Is Not A Reviewable Order.

Larrance prays that this Court issue a writ of certiorari "to review the Illinois Supreme Court order that denied Petitioner leave to appeal from an order of the Illinois Appellate Court for the Fourth District." (Petitioner's Opening Brief, hereinafter referred to as "Pet. Op. Br." at 1.) The Illinois Supreme Court is the court of last resort in Illinois. Denials of leave to appeal "carry no connotation of approval or disapproval of the appellate court action, and signify only that four members of this court, for reasons satisfactory to them, have not voted to grant leave." *People v. Vance,* 76 Ill. 2d 171, 183, 390 N.E.2d 867, 872 (1979). This Court consistently has held under these circumstances that if any judgment is properly reviewable under 28 U.S.C.A. § 1257 (West 1966) it is that of the intermediate court, not the denial of leave to appeal. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 678 n.1 (1968). Thus, to the extent Larrance seeks review of the Illinois Supreme Court order, the petition should be dismissed for lack of jurisdiction.

B. The Questions Presented Are Not Reviewable Because They Compel Re-Examination Of The State Court's Findings Of Fact.

Both questions presented purport to be grounded on the premise that the Commission actively interfered with Larrance's charge filing. (Pet. Op. Br. at i.) As a result, the Court cannot address the merits of Larrance's due process claim without first reviewing the appellate court's findings of fact on this pivotal

issue. The premise that the Commission actively interfered is untenable. The appellate court, with the benefit of the complete common law record, found:

> [A]gency representatives did not mislead the petitioner. The agency position and its interpretation of the law was correctly stated to petitioner. This interpretation was altered by a judicial decision. Therefore, neither the agency nor the employer intentionally misled petitioner to his disadvantage since both acted on the information available.

(Petitioner's Appendix, hereinafter referred to as "App." at 22a.) The court further found that the agency did not treat Larrance "unfairly." (App. at 23a.) These findings were supported by the record. Indeed, in the nine years since Larrance filed his charge, no one has suggested that the information the Commission gave him about the filing deadline was wrong. The fact that a judicial decision retroactively modified the Commission's interpretation does not support Larrance's contention that the Commission misled him, refused to file his charge or treated him unfairly.

This Court would have to reject the findings of fact below as a prerequisite to consideration of the asserted federal questions. That is something the Court generally does not do and for which there is no basis in this case. *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *See also Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952).

C. The First Question Presented Raises No Federal Question.

Contrary to what Larrance asserts, the decision of the appellate court does not give rise to a constitutional issue.

1. The Constitutional Right Upon Which Larrance's Due Process Claim Is Premised Does Not Exist.

Larrance's due process claim is based on an erroneous interpretation of the Illinois Constitution. In Section I.A. of his argument, Larrance contends that he had "an entitlement to be free from discrimination guaranteed by the Illinois consti-

tution . . . " (Pet. Op. Br. at 13.) This entitlement purportedly arises from Article I, Section 19 of the Illinois Constitution, which provides as follows:

> All persons with a physical or mental handicap . . . shall be free from discrimination, unrelated to ability in the hiring and promotion practices of any employer.

ILL. CONST. art. I, § 19. According to Larrance, "[t]his state-created right is the foundation for Petitioner's claim of employment discrimination." (Pet. Op. Br. at 12.) The courts of Illinois, however, disagree with Larrance's construction of Article I, Section 19. In *Yount v. Hesston Corp.*, 124 Ill. App. 3d 943, 949, 464 N.E.2d 1214, 1219 (2d Dist. 1984), the court held that Section 19 "limits a claim of discrimination based on [handicap] to 'the hiring and promotion practices of any employer.' " Accordingly, it does not encompass cases "involving termination and discharge from employment." *Id.* (relying on *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill. App. 3d 878, 458 N.E.2d 985 (1st Dist. 1983) and *Greenholdt v. Illinois Bell Telephone Co.*, 107 Ill. App. 3d 748, 438 N.E.2d 245 (4th Dist. 1982)).

Because the right upon which the petition is premised does not exist, the writ should be denied.

2. The Circumstances Of Larrance's Tardy Charge Filing Do Not Entitle Him To Due Process Protection.

Larrance would have this Court believe that his case is "virtually identical" to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (Pet. Op. Br. at 11.) This contention is baseless for two reasons. First, *Logan* did not involve the 180 day charge filing period in question. Second, *Logan* involved a clear case of agency misconduct.

Logan addressed the Commission's obligation to convene a fact-finding conference within 120 days after the claimant filed his or her charge. Significantly, Logan could not schedule the conference himself within the statutorily dictated period. Responsibility for doing so was exclusively within the control of the agency. Responsibility for filing a timely charge, however,

is within the exclusive control of the complainant. He may submit it on the first day after an unfair employment practice has been committed or any day thereafter, as long as filing is accomplished within 180 days. The Commission was statutorily obligated to accept all charges timely filed. Thus the 180 day charge filing period is fundamentally different than the time requirement involved in *Logan*.

This Court has acknowledged the distinction. Although it held that Logan, whose charge was timely, could not be deprived of his constitutionally protected property interest without an opportunity to present his claim of entitlement, the majority cautioned: "This is not to suggest, of course, that the State must consider the merits of the claim when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge." 455 U.S. at 434 n. 7. The court further held:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, [citation omitted] or, in an appropriate case, filing fees. [citation omitted] And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.

Id. at 437. In his separate opinion, Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, agreed that: "Logan does not and could not quarrel with the requirement that complainants file their charges in a timely fashion." *Id.* at 441. Thus the due process right the Court recognized in *Logan* does not arise here because there was no timely charge. Although Larrance contends that the Commission sat on his charge, that claim is untenable in view of the fact that the Commission complied with all prevailing legal requirements. Unlike Logan, Larrance cannot point to a statutory requirement that the Commission breached.

As an additional point of distinction, *Logan* was a clear case of agency misconduct. The Commission simply failed to convene a fact-finding conference within 120 days. In contrast, and as the appellate court found, agency representatives did not

mislead Larrance or treat him unfairly. Under these circumstances *Logan* is inapt, and the due process issues which arose there are absent.

3. Because Larrance Had Counsel Within The 180 Day Period, No Due Process Issue Arises.

The relief Larrance ultimately seeks, forgiveness for his untimely charge filing, is unavailable because he had a lawyer. As set forth in Country Companies' Statement of the Case, Larrance engaged Jon Robinson as early as October 3, 1979. Although Larrance claims he did not hire Robinson to attend to his Commission claim, the record belies this assertion. In answers to interrogatories, submitted under oath, Larrance confirmed that Robinson was consulted "regarding his claim of handicap discrimination" on October 3, 1979 and that he had two phone calls and two personal visits with Robinson regarding his "claim of handicap discrimination" before that date. (Larrance's Answers to Interrogatories 1 and 2.)

As a matter of law, a claimant may not overcome a tardy charge filing if he consulted counsel during the statutory filing period. *Leite v. Kennecott Copper Corp.*, 558 F. Supp. 1170, 1173-74 (D. Mass. 1983), *aff'd*, 720 F.2d 658 (1st Cir. 1983); *Keyse v. Cal. Tex. Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978); *Needham v. Beecham, Inc.*, 515 F. Supp. 460, 467 (D. Maine 1981); *Hamel v. Prudential Ins. Co.*, 640 F. Supp. 103, 105 (D. Mass. 1986). In *Leite*, the claimant's argument that the responsible agency had misinformed him regarding the statute of limitations did not prevent the court from granting the defendant's motion for summary judgment. Similarly, in *Hamel*, the court held:

> Conceeding [sic] for the purposes of this motion that the federal agency committed some administrative error in delaying preparation of the charge, this did not relieve Hamel's counsel of the ultimate responsibility of monitoring his client's claim. That is precisely what a lawyer is paid to do. It is the job of the lawyer, not the agency, to keep the client's claim from going stale. In circumstances such as this, equity does not require tolling the limitations

> period . . . Civil rights laws need not be interpreted so as to make them traps for the unwary. On the other hand, neither need the laws be interpreted so as to protect those who ought know better from their own indolence.

640 F. Supp. at 105.

The evidence below established that Larrance and Robinson intentionally withheld the charge while attempting to negotiate with Country Companies over renewal commissions. On October 4, 1979, Robinson wrote to Country Companies' Executive Vice President, Duane Miller. In that letter, Robinson stated:

> In addition, the Illinois Fair Employment Practices Commission has been contacted regarding the basis for his [petitioner's] termination, and we would like to pursue this if your company is not willing to pay him the three percent (3%) commission on renewals.

(Resp. Ex. 2; R. Vol. VII at 117.) This letter confirms not only that Robinson knew about Larrance's discrimination claim, but that he was authorized to write about it and, with Larrance's blessing, elected to use the claim as a bargaining chip to exact renewal commissions from Country Companies. Thus, unlike Logan, Larrance cannot in good faith assert that his claim went stale for reasons beyond his control.

Because Larrance, after retaining counsel, intentionally delayed filing his charge to increase his bargaining position with Country Companies, he cannot establish a deprivation of due process.

4. There Is No Basis For Larrance's Contention That The Commission Has Unlawfully Hindered Other Claimants.

Larrance tries to enhance his petition by suggesting that "thousands" of claimants have had their claims lost "because the FEPC failed to act within the jurisdictional limit." (Pet. Op. Br. at 11.) This argument brutally misconstrues the record. Larrance relies exclusively on an amicus brief filed by someone named Jerald Beene. (App. at 28a.) The brief nakedly asserts

that approximately five thousand people may lose their rights "through no fault of their own" if by filing the Commission's intake form, called a Complainant Information Sheet ("CIS"), they are not deemed to have filed a timely charge.

Larrance argued below that his completed CIS form should have been deemed a timely charge. The appellate court disagreed. Larrance has not challenged that finding in his petition. Accordingly, the procedure which purportedly has caused others to lose their claims is not at issue before this Court. Even if it were, Larrance cannot successfully assert that if he lost any rights it was through no fault of his own.

D. The Second Question Presented Fails to Raise A Federal Question.

Larrance's question regarding the retroactive application of *Board of Governors Of State Colleges And Universities For Northeastern Illinois University v. Rothbardt.* 98 Ill. App. 3d 423, 424 N.E.2d 742 (4th Dist. 1981), *appeal denied,* No. 55433 (Nov. 30, 1981), does not create a federal question. This Court has held repeatedly that the Constitution neither prohibits nor requires retroactive application of judicial decisions. As Justice Cardozo wrote in *Great Northern Railway Co. v. Sunburst Oil and Refining Co.,* 287 U.S. 358, 364 (1932): "We think the federal constitution has no voice upon the subject." *See also Linkletter v. Walker,* 381 U.S. 618, 629 (1965). In light of this authority, the second question presented fails to raise a federal question and thus is not one over which this court has jurisdiction under 28 U.S.C.A. § 1257 (West 1966).

Petitioner's reliance on *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), is misplaced. In *Chevron,* the court considered the retroactivity of its own *Rodrigue* decision, not the retroactivity of an intermediate state court decision. Nowhere in *Chevron* did the court mention due process. Moreover, the retroactivity question in *Chevron* required interpretation of the Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* Hence, the petitioner there was able to present a federal question.

Even if the Court had a jurisdictional basis for reviewing the retroactivity of *Rothbardt,* Larrance could not establish that

the appellate court exercised its discretion improperly. *Rothbardt* neither overruled clear past precedent nor was a case of first impression whose resolution was not clearly foreshadowed. The charge filing statute at issue refers neither to the last day worked nor notice of termination. Rather, it states that a charge must be filed within 180 days "after the date that an unfair employment practice allegedly has been committed . . . " ILL.REV. STAT. ch. 48, para. 858 (1979). This language clearly is susceptible to the interpretation articulated in *Rothbardt*. Indeed, this Court twice has held that similar statutory language supports the *Rothbardt* construction. *See Del. State College v. Ricks,* 449 U.S. 250 (1980); *Chardon v. Fernandez,* 454 U.S. 6 (1981).[2] In both *Ricks* and *Chardon* the Court held the complaints time-barred, thus giving its decision retroactive effect.

Larrance also fails to cite a single judicial decision, state or federal, upon which he relied in determining when to file his charge. Indeed, he claims that the Commission unilaterally decided when the charge would be accepted. Even if there were evidence of reliance and a case which justified it, Larrance's reliance argument would be unavailing due to the fact that he had a lawyer.

Lacking a federal basis, Larrance's retroactivity question is insufficient to invoke this Court's jurisdiction.

E. Larrance's Asserted Due Process Claims Are Logically Incompatible.

Larrance's contentions that (1) like Logan he was the victim of active agency interference and (2) the retroactive application of *Rothbardt* violated his due process are analytically irreconcilable. His first argument is premised on the claim that the Commission caused his charge to be untimely by letting it lapse

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[2] Before Larrance filed his charge, at least two federal courts of appeals foreshadowed *Rothbardt* by holding that the time for filing a charge of employment discrimination began to run upon notice of the adverse employment decision. *See Bireline v. Seagondollar,* 567 F.2d 260 (4th Cir. 1977), *cert. denied,* 444 U.S. 842 (1979); *Jackson v. Hayakawa,* 605 F.2d 1121 (9th Cir. 1979); *cert. denied,* 445 U.S. 952 (1980); *Abramson v. Univ. of Hawaii,* 594 F.2d 202, 209 (9th Cir. 1979).

or by refusing to file it. His second argument presumes that the Commission complied with "existing law" (Pet. Op. Br. at 21), but that the law changed to Larrance's detriment. Larrance cannot have it both ways. Either the Commission actively interfered with his charge filing or it did not. The fact that the Commission complied with "existing law," as Larrance acknowledges, compels the conclusion that there was no active interference. Yet because, as established above, retroactive application of *Rothbardt* has no due process implications, Larrance's second argument topples as well. The Court is left with no justification for granting the writ.

CONCLUSION

This Court lacks jurisdiction over the questions presented. Assuming jurisdiction exists, Larrance's reasons for granting the writ are groundless. Accordingly, the writ should be denied.

Respectfully submitted,

MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, AND COUNTRY CAPITAL MANAGEMENT COMPANY

BERNARD HARROLD
Counsel of Record
WILDMAN, HARROLD,
ALLEN & DIXON
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400
Counsel for Respondents